"So far their Lordships have deliberately refrained from speaking of "onus of proof". It is an expression which, if it is used in relation to proceedings which are interlocutory in their legal character, is liable to lead to confusion. Their Lordships have already noted the analogy between the effect of a caveat and that of an interlocutory injunction obtained by the plaintiff in an action for specific performance of a contract for the sale of land restraining the vendor in whom the legal title is vested from entering into any disposition of the land pending the trial of the action. The court's power to grant an interlocutory injunction in such an action is discretionary. It may be granted in all cases in which it appears to the court to be just and convenient to do so. Similarly in section 327 it is provided that "the court . . . may make such order on the application as it may think just". The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a "probability", a "*prima facie* case" or a "strong *prima facie* case" that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the court that his claim is neither frivolous nor vexatious; in other words that the evidence before the court discloses that there is a serious question to be tried. *American Cyanamid* v. *Ethicon Ltd.*(2).

This is the nature of the onus that lies upon the caveator in an application by the caveatee under section 327 for removal of a caveat; he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party."

Has the caveator (the appellants) succeeded in satisfying us, on the evidence that his claim to an interest in the property does raise a serious question to be tried?

Here again our answer to this question is in the negative.

The appeal is dismissed with costs here and in the court below. Deposit to the respondents to account of taxed costs.

Appeal dismissed.

Solicitors: *Stephen Goh & Partners; Skrine & Co.*

CHEN CHOW LEK v. TAN YEW LAI

[F. C. (Wan Suleiman Ag. C.J., Salleh Abas & Abdul Hamid F.JJ.] September 5 & November, 16, 1982] [Kuala Lumpur – Federal Court Civil appeal No. 166 of 1981]

Contract – Sale of Land – Forfeiture Clause – Relief against forfeiture – Equity of restitution.

Practice and Procedure – Application for amendment of statement of claim at appeal stage – Successful party to blame – Costs

In this case the respondent was a housing developer and he had agreed to sell a terrace house to the appellant on payment of instalments and interest. The parties signed a sale agreement and a memorandum of lease of the land A dispute arose between the parties as the respondent asked the appellant to execute a fresh memorandum of lease. The respondent not only refused to comply with the respondent's request but also refused to pay the land rent under the existing memorandum of lease. However the respondent continued to pay the instalments for the house. The respondent commenced a civil action in the Magistrate's Court against the respondent to enforce the forfeiture provision of the sale agreement, that is, to recover possession of the house, the instalments and the various payments under the memorandum of lease. The respondent on the other hand took out a writ against the appellant in the High Court claiming a declaration that that the sale agreement and the memorandum of lease were null and void because the execution was obtained by fraud or coercion and also because the terms were harsh and unconscionable. The case in the Magistrate's Court was transferred to the High Court and both suits were consolidated and tried together. Mohamed Azmi J. gave judgment for the respondent and gave him possession of the house and various sums due under the agreement. The appellant appealed. At the hearing of the appeal counsel for appellant applied for an amendment of the statement of claim to the effect that no forfeiture of the land could in law be enforced by the defendant-respondent without satisfying the equities in the plaintiff-appellant's favour.

Held: (1) The primary purpose of the forfeiture clause in this case was to secure the payment of the instalments and interest due in the purchase of the house. On the basis of the amount paid by him the appellant should be entitled to relief, because otherwise the forfeiture would become a penalty as the appellant by almost fully paying for the house had acquired an equity of restitution;

(2) in this case the appellant had not refused to pay the instalments for the house altogether and on this ground, that is, the acceptance of payments by the respondent after the suit started, the relief asked for could be granted;

(3) in view of the conduct of the appellant in this case, the court cannot fully acquit him of blame and as such it was proper that he should pay the costs of the proceedings both in the High Court and the Federal Court.

Cases referred to:

(1) *Shiloh Spinners Ltd.* v. *Harding* [1973] 2 W.L.R. 28; [1973] 1 All E.R. 90.

(2) *Stockloser* v. *Johnson* [1954] 1 Q.B. 476, 492.

(3) *Gill & Another* v. *Lewis & Anor.*, [1956] 2 Q.B. 1.
(4) *Lam Kee Ying Sdn. Bhd.*, v. *Lam Shes Tong & Anor.* [1974] 2 M.L.J. 83.
(5) *Tan Yew Lai* v. *Shadique* [1978] 1 M.L.J. 139.

FEDERAL COURT.

G. Sri Ram for the appellant.
S.D.K. Peddie (*Miss J. Somasundram* with him) for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering Judgment of the Court): The respondent is a housing estate developer building houses for sale to members of the public. He built a housing estate known as Tan Yew Lai Garden on three pieces of lands belonging to him, namely, EMR 2065 Lot 1407, Grant 4797 Lot 382 and Grant 5181 Lot 1096, all in the Mukim of Petaling, District of Kuala Lumpur. The estate was developed in four separate phases. The first phase which commenced in 1963, and was completed in 1965 consisted of 106 units of single storey terrace houses. Each unit was sold at a price varying between $12,000.00 and $12,500.00. The booking fee was $2,000.00 for each unit and the respondent financed the sale by providing loans to the purchasers at 9.6 per cent interest repayable by monthly instalments for ten to fifteen years. All these 106 units of terrace houses were sold subject to a condition that the lands on which the houses were erected were leased to the purchasers in three consecutive leases of thirty years each, thus making a total period of ninety years.

The appellant was one of the 106 purchasers of these terrace houses. In 1964 he paid a booking deposit of $2,000.00 for the unit that was to be constructed on sub-Lot 99. On March 2, 1964 he paid another $2,000.00 and on February 6, 1965 another $2,000.00, thus making a total payment of $6,000.00 towards the price of the house. The house which he bought was priced at $12,500.00 and he therefore took a loan of $6,500.00 repayable by monthly instalments of $86.45 which included interest at 9.6% per annum for 10 years.

The houses having been completed on March 24, 1965 the appellant took possession of the key and later went into occupation of it. On April 4, 1965, like the rest of the purchasers of these houses under the first phase, the appellant signed two legal documents in the office of Messrs Lovelace and Hastings, the solicitors for the respondent.

The first document is a sale agreement by which the respondent sold the house on sub-Lot 99 to the appellant for $12,500.00 of which $6,000.00 was already paid and the balance was to be paid by monthly instalments of $86.45. The agreement contains a forfeiture clause to secure the payment of these instalments and interest. By this agreement also the respondent agreed to execute the second document, which is a registrable memorandum of lease of the land sub-Lot 99 for a period of 30 years, subject to the appellant's right to two renewals of 30 years each so that he would have "an uninterrupted lease of 90 years in the form of three leases of 30 years each". Under the memorandum of lease the appellant is required to pay the respondent rents at $120.00 per year, service charges and other payments. Failure to pay the rents entitles the respondent to re-enter upon the leasehold which upon such re-entry will become extinguished.

The appellant kept on paying all the dues under these two documents, until a dispute arose between the parties in 1970. The dispute arose in the following way:

After the memoranda of lease for the 106 units of houses had been presented for registration on August 2, 1966 the respondent applied for subdivision of the land in respect of these 106 units of houses. Because of the application the Land Office refused to register the memoranda of leases unless a provision to the effect that the lessees had no objection to the subdivision was included in them. The memoranda were therefore returned to the respondent unregistered and the application for registration was treated by the Land Office as withdrawn. In order to comply with the requirement of the Land Office the respondent called upon all purchasers of the first phase to execute fresh memoranda of leases. The response from them was that 53 of them executed fresh memoranda of leases with the required provision added thereto, whilst 6 of them converted their leases into titles in perpetuity. 27 of them refused to sign fresh memoranda but continued to regard the existing leases as valid and so paid the land rents to the respondent, whilst the remaining 20, including the appellant, refused to sign the memoranda and also refused to pay land rents on the ground that the memoranda of leases they executed earlier were invalid on account of fraud and/or coercion.

It was thus the result of the respondent calling upon the appellant to execute a fresh memoran-

dum of lease in 1970 that the dispute between them arose. The appellant not only refused to comply with the respondent's request to sign a fresh memorandum but also refused to pay the land rent under the existing memorandum of lease. But as regards the house the respondent admitted in evidence that he paid all except for a balance of about $100.00.

A lengthy exchange of letters ensued between the parties. From the tone of his letters it appears that the appellant took up this stand because he was unhappy when he came to know that purchasers of houses under other phases obtained titles in perpetuity. Attempts by the respondent's solicitors to explain why fresh memoranda were required were not successful. The reply from the appellant was always not at all helpful, and one of nonco-operation.

Finally, the respondent gave notice to the appellant of the arrears of instalments and rents and other dues and required him to pay them immediately, and when he failed to make the payments on November 2, 1971, the respondent commenced a civil action in Magistrate Court, Petaling Jaya against the appellant (Civil Action No. 393/1971) to enforce the forfeiture provision of the sale agreement, i.e. to recover possession of the house, the instalments and the various payments under the memorandum of lease. In response to this civil action on February 8, 1972 the appellant took out a writ in the High Court (Civil Suit No. 91/1972) against the respondent with an indorsed statement of claim asking for a declaration that the sale agreement and the memorandum of lease were null and void because the execution was obtained by fraud and/or coercion and also because the terms were harsh and unconscionable.

The respondent's Magistrate Court Action (C.A. 393/1971) was transferred to the High Court on April 7, 1977 and became High Court Civil Suit No. 895/1977. Finally, both the civil suits were consolidated and tried together by an order of the High Court given on June 5, 1978.

The trial was held before Mohamed Azmi J. on June 27, 1978 with the appellant treated as the plaintiff and the respondent as the defendant. It was rather a protracted trial with several adjournments in between. Finally, in a reserved judgment delivered on August 21, 1981 the learned Judge held that both the sale agreement and the memorandum of sale were valid and that there was no fraud or coercion on the part of the respondent or his agent inducing the appellant to execute these two legal documents and that the appellant bought the house with only a lease of the land on which the house stands and not with a freehold title to it. He therefore dismissed the appellant's suit with costs and upheld the respondent's claim in the following terms:

(1) The respondent was given possession of the house as from the date of his civil action, i.e. November 2, 1971;

(2) He was entitled to –

(a) the sum of $98.79 stated in his prayer (ii), being balance of overdue interest from 23.4.1965 to 28.10.1971;

(b) a sum of $1,333.04 being the amount due under the memorandum of lease;

(c) damages at $120.00 per annum for the use and occupation of the land and of the house at $86.45 per month from November 2, 1971 until the appellant delivers possession, but the total amount of damages has to be reduced by a sum of $3,488.00 being the total amount of forty instalments up to the date paid for the house;

(d) interest at 6% from the date of judgment until realisation on all the sums awarded; and

(e) costs of the suit.

It is from the decision of the learned Judge that the appellant now appeals to us, contending that the decision was erroneous.

At the outset of the hearing before us Mr. Sri Ram, counsel for the appellant, applied by motion to amend the appellant's statement of claim by renumbering the existing paragraph 10 as sub-paragraph 10 (a) and adding a new sub-paragraph 10 (b) as follows:

"Alternatively, if the Plaintiff purchased only the house and not the land the Plaintiff contends that no forfeiture or eviction can in law be enforced by the Defendant without satisfying, by the payment of reasonable compensation, the equities that subsist in the Plaintiff's favour by such purchase."

We allowed the motion because we think that it is fair that we should do so as the proposed amendment is fully covered by evidence in the records and not in any way prejudicial to the respondent.

In his address to us, Mr. Sri Ram made no submission at all on the finding of the learned Judge despite the appellant's memorandum of appeal contending that the decision of the learned trial Judge was erroneous. We must therefore hold that he accepted the findings of the learned Judge that the two documents were valid and that the appellant only bought a leasehold house and not a freehold house. The submission of Mr. Sri Ram simply consists of an elaboration of the appellant's contention in terms of the amended paragraph of his Statement of Claim, although this was admittedly an alternative argument. Mr. Sri Ram submitted to us that because the appellant had completed paying for the house he was entitled to the relief from its forfeiture and that even if the court is reluctant to grant the relief the appellant, having acquired an equity because of the payments he made in respect of the house, should be entitled to a compensation to satisfy the equity and in that event the case should be remitted to the Senior Assistant Registrar to assess the compensation.

The forfeiture provision of the sale agreement which was enforced by the respondent in his suit is contained in clause 3 which is as follows:

"3. In the event of the Purchaser failing to pay any instalments and interest when due the whole of the balance outstanding and any interest due but unpaid shall become immediately payable and in the event of such balance not being paid within 10 days after demand the following results will ensue from such default

(a) All sums of money hitherto paid by the Purchaser to the Vendor whether to account of the purchase price or by way of monthly instalments and/or interest shall be absolutely forfeited to the Vendor by way of liquidated damages for breach of contract.

(b) Possession of the premises shall forthwith revert to the Vendor who may dispose of the same as he thinks fit.

(c) If the house or any part thereof should be occupied by the Purchaser he shall forthwith give vacant possession thereof to the Vendor notwithstanding any lease that may have been granted by the Vendor to the Purchaser in respect of the land on which the house is erected.

(d) Subject to the aforesaid this agreement shall be rendered null and void and of no further effect."

On the date when he was sued by the respondent, i.e. on November 2, 1971, the undue balance of the purchase price was stated in the respondent's statement of claim as $2,625.88 and an overdue interest as $98.79. It was on the basis of the appellant failing to pay this overdue interest that the forfeiture of the house under the sale agreement was invoked. But now there is no dispute that the appellant had paid all the purchase price of the house expect a balance of about $100.00. This is clearly stated by the respondent himself at the trial. In his evidence at page 86 of the Appeal Record he said:

"Now, he has paid all except for a balance of about $100.00 on the house."

This shows that the appellant kept on paying the instalments on the house even after the litigations commenced and the respondent kept on receiving them.

As to the question whether a relief should be granted or not, we find no better guide than to reproduce the speech of Lord Wilberforce in *Shiloh Spinners Ltd.* v. *Harding*[1]. His Lordship said at page 38:

... "I would fully endorse this: it remains true today that equity expects men to carry out their bargains and will not let them buy their way out by uncovenanted payment. But it is consistent with these principles that we should reaffirm the right of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of convenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result. The word 'appropriate' involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach."

The primary object of the forfeiture clause in this case is to secure the payment of the instalments and interest due in the purchase price of the house. On the basis of the amount paid by him, the appellant should be entitled to the relief, because otherwise the forfeiture would become a penalty as the appellant by almost fully paying up for the house had in the words of Lord Denning, L.J. in *Stockloser* v. *Johnson*[2] acquired "an equity of restitution". But we have to consider also whether there is anything in the conduct of the appellant which disentitled him to this equitable relief urged by his counsel for the first time. We were referred by Mr. Peddie, counsel for the respondent, to the rude letters which the appellant wrote to the respondent's solicitors in response to their request asking the appellant to sign a fresh memorandum of lease. We agree that the tone of these letters seem unbecoming and cannot be expected amongst legal practitioners and other polite circles but the appellant is only a salesman.

Allowances should be made for people of his class and upbringing. In our view these letters by themselves are not sufficient to deprive the appellant of the relief sought for. He might well be very foolish to write these letters in that tone or he might well be ill-advised to take a hard and inflexible stance that the documents he signed were null and void; but having regard to the sensitivities of human feeling certainly he was morally excusable for being angry when he discovered that phase two purchasers in respect of the same housing estate obtained better titles than he did. It would be different, however, if he refused to pay the instalments for the house altogether. Apparently he did pay and the balance on the date of trial was reduced to only $100.00. On this ground alone, i.e. acceptance of payments by the respondent after the suit was started, the relief asked for could be granted. *Gill & Anor* v. *Lewis & Anor.*[3]

We note that the memorandum of lease is still in existence as it is not affected by the order of the learned trial Judge.

In the circumstances we think that this is an appropriate case in which we should grant a relief against the forfeiture of the house. The appellant is therefore entitled to the house and its occupation subject, of course, to the payment of whatever balance due under the sale agreement and under the memorandum of lease. In view of our decision to grant relief, there is no need for us to consider the alternative argument submitted by Mr. Sri Ram. We wish to say here that although this is the first time the appellant was making an application for the relief, in view of *Lam Kee Ying Sdn. Bhd.* v. *Lam Shes Tong & Anor,*[4] we are entitled to entertain the application. The damages ordered by the Court below is set aside.

As to the costs of this appeal and the proceedings in the court below we wish to make the following observations: This case is not the first case in which the respondent is involved in a litigation in connection with his Tan Yew Lai Garden. A dispute between him and another purchaser reached the High Court and was tried by Chang Min Tat, J. (as he then was) in April, 1977 – (See *Tan Yew Lai* v. *Shadique).*[5] The facts in that case were similar to those in the present case except that the purchaser in that case did not sign any sale agreement nor any memorandum of lease. If the appellant's advisers had appreciated the implications of that case, i.e. *Shadique's* case, it would be unthinkable for him to go on maintaining that the sale agreement and the memorandum of lease were void, because if this contention were to succeed there would be no instrument which would govern the appellant's purchase and occupation of the house and the land. The consequences would therefore be the same as that in *Shadique's* case in that the appellant would be a mere tenant at will without any right to either freehold or leasehold of the house and land.

Further, we are of the view that had the appellant been co-operative this case would not have come to court. The respondent would probably not have started the civil suit. This litigation has been completely unnecessary and could have been avoided but for the appellant's attitude. We also observe that even during the pendency of the suit the respondent was still trying to persuade the appellant to come to terms by writing a polite letter explaining to the appellant why a fresh memorandum of lease was needed. But unfortunately this was rebuffed by the appellant. Thus, in view of his conduct, we cannot fully acquit him of the blame and as such we deem it proper that he must pay the costs of the proceedings both in the Court below and before us.

We also like to express the hope that the appellant should sign a fresh memorandum of lease if this document is still needed by the respondent, or should take steps to convert his leasehold to freehold in order to avoid future troubles.

The appeal to the extent stated above is allowed.

The costs of the proceedings before this court, and in the court below should be borne by the appellant and the deposit should go to the respondent on account of taxed costs.

Order accordingly.

Solicitors: *Sri Ram & Co.; J. Somasundram*